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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

TERRANCE R. MOUNT and SHARON G. MOUNT,
Petitioner,

VS.

EL DORADO COUNTY SUPERIOR COURT,
Respondent,

STATE FARM FIRE AND CASUALTY COMPANY,
Real Party in Interest and Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA OF A DECISION OF THE COURT OF APPEAL THIRD APPELLATE DISTRICT OF A DECISION OF THE EL DORADO COUNTY SUPERIOR COURT

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36 pp

QUESTION PRESENTED

1. Are the Federal Criminal Statute of Limitations for either or both Bank Fraud (Title 18 U.S.C. section 1344) or Wire Fraud (Title 18 U.S.C. section 1343) as extended under the statute of Limitations of Title 18 U.S.C. section 3292, still running, such that Petitioners face potential Federal Criminal Prosecution for which they may legally assert their respective 5th Amendment privileges against compelled testimony against themselves in the state civil action.

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OPINIONS BELOW

The decision of the California Supreme Court is reproduced in the Appendix at page 1. The decision of the Court of Appeal of the State of California in and for the Third Appellate District is reproduced in the Appendix at pages 2 to 3. The decision of the trial court is reproduced in the Appendix at pages 4 to 5.

JURISDICTION

The California Supreme Courts' decision herein was rendered on May 25, 1994. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 2101 (c).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself.

Title 18 U.S.C. section 3293 reads:

> 3293. Financial institutions offenses. No person shall be prosecuted, tried or punished for a violation of, or a conspiracy to violate-
>
> (1) section 215, 656, 657, 1005, 1006, 1007, 1008, 1014 or 1344;
>
> (2) section 1341 or 1343, if the offenses affects a financial institution; or
>
> (3) section 1963, to the extent that the racketeering activity involves a violation of section 1344;
>
> unless the indictment is returned or the information filed within *10* years after the commission of the offense.

Title 18 U.S.C. section 1343 reads:

> 1343. Fraud by wire, radio or television
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio or television com-

munication in interstate or foreign commerce, any writings, signs, signal, pictures, or sounds for the purposes of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more then five years, or both. If the violation affects a financial institution such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Title 18 U.S.C. section 1344 reads:

1344. Bank Fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice-

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

STATEMENT OF THE CASE

A. INTRODUCTION

Real Party in Interest, State Farm Fire and Casualty Company (hereinafter State Farm) filed a lawsuit on November 6, 1990, against Petitioners, alleging Fraud, Misrepresentation and Recision of the contract of Insurance. This lawsuit was the result of the individual Petitioners entering individual pleas of Nolo Contendere to the Information filed on April 21, 1988, and specifically acount III of that Information charging a violation of Section 556a(a)(1),

commonly referred to as Insurance fraud, a felony. That section was repealed in 1989 and replaced by section 1871.1 of the Insurance Code.

Count III to which the Petitioners entered their respective pleas of Nolo Contendere, had as a factual basis for the plea the following:

> "... said Terrance Mount and Sharon Mount, on or about January 24, 1985 to January 9, 1986, in the said County of El Dorado, said State of California, and before the filing of this information, did then and there knowingly present or cause to be presented false and fraudulent claims for the payment of a loss under a contract of insurance concerning a fire loss occurring on or about December 24, 1984, in violation of Section 556a(a)(1) of the California Insurance Code, a felony." (See Exhibit A, attached hereto and incorporated herein by reference.)

Although charged in counts I and II, allegations regarding the Petitioners' involvement in Insurance Fraud from State Farm from on or about May 29, 1984 to April 23, 1985, concerning a fire loss which occurred on or about May 28, 1984, and from on or about June 5, 1984 to May 21, 1985, concerning a theft losses which occurred on or about May 30, 1984 and June 26, 1984, these were dismissed, and no evidence was ever presented or received regarding Counts I and II. Neither Petitioner made any statements regarding Counts I and II.

State Farm's complaint alleges that as a result of a claimed fire loss which occurred on or about May 28, 1984, a claimed theft loss which occurred on or about May 30, 1984, a claimed theft loss which occurred on or about June 26, 1984 and a second claimed fire loss which occurred on or about December 24, 1984, the Petitioners made fraudulent claims regarding Insurance to State Farm which

lasted from on or about May 29, 1984 to until January 9, 1986. State Farm brought before the Trial Court in Superior Court of El Dorado County, the original motion to compel Petitioners to testify in deposition regarding the May 1984 fire; the May 1984 theft; the June 4, 1984 theft (which is not alleged in the complaint and thus is irrelevant to Plaintiff's lawsuit); the June 26, 1984 theft and the December 1984 fire. Defendant Sharon Mount has answered all questions regarding the December 1984 loss as it relates to the Insurance Fraud.

Petitioner Terrance Mount has not had his deposition taken, but in the interest of good faith and reasonableness, Petitioners when asked by State Farm's counsel, stated that Mr. Mount's position is the same as Mrs. Mount, as far as the assertion of the 5th amendment and the answering of questions.

B. The assertion of the petitioners' fifth amendment right not to incriminate themselves

During the entire course of the pre-trial discovery, neither Petitioner has waived, as the Trial Court factually found and so held, their respective Fifth Amendment rights, which are at issue herein.

Petitioners have timely asserted, and continue to assert, their Fifth amendment privilege against self incrimination as guaranteed to them under the Fifth Amendment of the Constitution of the United States.

It is well established that the privilege against self-incrimination may be invoked not only by a criminal defendant, but also by parties or witnesses to a civil action. (Alvarea v. Sanchez, (1984) 158 Cal.App.3d 709, 712).

In addition, waivers of Constitutional rights are lightly found. (Heda v. Superior Court, (1990) 225 Cal.App.3d 525, 530). The seminal case dealing with the 5th amend-

ment rights is Hoffman v. United States, (1950) 341 U.S. 479, page 486, which holds:

> "The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.... To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."

C. The ten year Statute of Limitations for 18 U.S.C. section 3293, which applies to 18 U.S.C sections 1343 and 1344, has not run

Petitioners' attempted to demonstrate to the Honorable Trial Court and the Third District Court of Appeal and the California Supreme Court, that the ten year Federal statute of limitations under Title 18 U.S.C. section 3293 applies to this case within the meaning of at least two Federal statutes, one, Title 18 U.S.C. 1343 (Wire Fraud) and Title 18 U.S.C. 1344 (Bank Fraud).

Title 18 U.S.C. section 3293 reads:

> 3293. Financial institutions offenses.
>
> No person shall be prosecuted, tried or punished for a violation of, or a conspiracy to violate-
>
> (1) section 215, 656, 657, 1005, 1006, 1007, 1008, 1014 or 1344;
>
> (2) section 1341 or 1343, if the offenses affects a financial institution; or

(3) section 1963, to the extent that the racketeering activity involves a violation of section 1344;

unless the indictment is returned or the information filed within *10* years after the commission of the offense.

Title 18 U.S.C. section 1343 reads:

1343. Fraud by wire, radio or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio or television communication in interstate or foreign commerce, any writings, signs, signal, pictures, or sounds for the purposes of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more then five years, or both. If the violation affects a financial institution such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Title 18 U.S.C. section 1344 reads:

1344. Bank Fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice-

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Respectfully, the honorable trial court erroneously held that Petitioners' fraudulent scheme induced State Farm to legally withdraw its funds from the bank and pay their property loss claims; The bank was in no way the victim of the fraud; Since Title 18 U.S.C. section 3293 provides a ten year statue of limitations period for violations of Title 18 U.S.C. sections 1343 and 1344 if "the offense affects a financial institution"; and; Since the fraud does not "affect a financial institution", the petitioners are not subject to prosecution under sections 1343 and 1344, thus the petitioners may not assert their Fifth amendment rights. (See Appendix A at pages 4 to 5).

The Third District Court of Appeal, on Thursday April 28, 1994, summarily denied Petitioners' Petition for Writ of Mandate, Prohibition or other relief with request for stay, which is reproduced in the Appendix A at pages 2 to 3; and the California Supreme Court, on Wednesday, May 5, 1994, denied Petitioners' Petition for Review, which is reproduced in Appendix A at page 1.

D. The trial court's decision below

The trial court's decision, reproduced at Appendix A pages 4 to 5, held that petitioners' had not waived their fifth amendment privilege, but that the case of *U.S.* v. *Blackmon*, (2nd Cir. 1988) 839 F.2d 900, controlled in that the bank had to be a victim of the fraud by petitioners and the bank was not, thus, the petitioners are not subject to criminal prosecution under sections 1343 and 1344, and can not assert the privilege under the 5th amendment.

E. The Third District Court of Appeals' decision below

The Third District Court of Appeals' decision, reproduced at Appendix A, pages 2 to 3, denied the petition for writ of mandate, prohibition or other relief.

F. The California Supreme Court's decision below

The California Supreme Court's decision, reproduced at Appendix A, page 1, denied in Bank the application for stay and petition for review.

ARGUMENT

A. U.S. v. Blackmon Does Not Apply To This Case

State Farm has cited and the trial court ruled that the case of *United States v. Blackmon*, (2nd Cir. 1988) 839 F.2d 900, is controlling and dispositive of this case. A close look at both the facts and the holding of *Blackmon* discloses the error the trial court made.

In *Blackmon*, the facts are basically as follows: Defendants persuaded wealthy elderly women that they had "found" cash earmarked for Iran or the PLO, and then convincing the women to withdraw *the womens' money* from *the womens' own bank accounts*, in an amount equivalent to the womens' "share" of the found cash; then convert the money that the *women had legally withdrawn from their own bank accounts*, convert that *legally withdrawn money* into foreign currency and then the *women gave the foreign currency to the defendants.* The women never saw the foreign currency again. (*Blackmon*, supra, at page 903.)

On appeal, after conviction, the defendants raise the issue of whether the Bank Fraud statute (18 U.S.C. section 1344) intends to cover the situation faced by the Second Circuit Court of Appeals where money is merely withdrawn *legally* from a federally insured bank by a victim (the women) and where the bank is in no way victimized. (*Blackmon*, supra, at page 904). In addition, the Government conceded on appeal that the property (money or value) must be obtained at a time when the bank has *custody or control* of the property.

The Government tried to establish this by arguing, unsuccessfully, that the women were the agents of the defendants when the women withdrew the money. The Government argued the theory of "*innocent intermediaries*" through 18 U.S.C. section 2(b). The Second Circuit Court of Appeals stated:

> "The application of the 'innocent intermediary doctrine to the facts here, however, would badly strain the logic of section 2(b). The *withdrawals of money from the banks were perfectly legal.* Moreover, the withdrawals were not undertaken by 'means of false or fraudulent pretenses, representations, or promises' (Citation omitted). Thus, even if the withdrawals were imputed to the defendants, the imputed acts would not constitute conduct proscribed by law. (*Blackmon*, supra at page 904-905.)

Finally, the Second Circuit Court of Appeals stated:

> "It is true that the victims' money in this case had *at one time* been 'under the custody or control' of federally insured banks. This, however, proves too much. The property obtained by the defendants' scheme was the foreign currency purchased by the victims with money legally withdrawn from the banks. At the time the foreign currency was obtained, it simply was not in any way under the control or custody of the banks. If the statute applied to these facts, it could apply to any situation where property purchased with money legally withdrawn from a federally insured bank was thereafter fraudulently obtained." (*Blackmon*, supra, at page 904.)

Only for the arguing of this petition and not for agreeing to or stipulating to any fact or facts, the facts in this case do not have either State Farm legally withdrawing money out of its own bank account and obtaining some other form of

money to pay to the Petitioners or having State Farm legally withdrawing money from the bank account of State Farm. The facts allegedly are that the Petitioners committed fraud against State Farm and by this fraud, obtained drafts (checks) on State Farm's bank accounts. Petitioners then allegedly took State Farm's drafts (checks) that had been obtained by fraud and obtained money that was under the *custody or control* of Federal Banks out of State Farm's account(s).

State Farm did no act of obtaining any monies out of its bank accounts and then obtain any other property of value with that money and give that other obtained property to Petitioners. At the time the Petitioners obtained the money by negotiating State Farm's drafts (checks), the banks had *custody or control* of the monies. *Blackmon* does not apply to this case.

B. To Sustain Petitioners Assertion Of The 5TH Amendment, It Need Only Be Evident From The Implications Of The Questions, That A Responsive Answer To The Question Or An Explanation Of Why It Cannot Be Answered Might Be Dangerous Because Injurious Disclosure Could Result

1.

HOFFMAN v. UNITED STATES

The seminal case dealing with the 5th amendment rights is Hoffman v. United States, (1951) 341 U.S. 479, pages 486-487, which reads:

> "This guarantee against testimonial compulsion, like other provisions of the Bill of Rights, 'was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be

> sacrificed.' (Citation omitted). This provision of the Amendment must be accorded liberal construction in favor of the right it was intended to secure. (Citation omitted)."
>
> "The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the *chain of evidence* needed to prosecute the claimant for a federal crime. (Citation omitted).... To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."

Here, any disclosure, whether oral or written or otherwise, of any information by either or both Petitioners, could furnish a link in the chain of evidence needed to prosecute under the Federal statues. (*Hoffman v. United States*, supra; *United States v. Brown*, (1990, 9th Cir.) 918 F.2d 82, 83-84; *Braswell v. United States*, (1988) 487 U.S. 99 at 104 and 111, note 5; *United States v. Doe*, (1984) 465 U.S. 605, 606; *United States v. Bellis*, (1974) 417 U.S. 85, 87-88). Also, the Petitioners are entitled to assert the 5th amendment to any inquiries that imply assertions of fact that may tend to incriminate. (*Doe v. United States* (1988) 487 U.S. 201, 209; *Fisher v. United States*, (1976) 425 U.S. 391, 410).

The issue before the Court is straight forward. There are potential Federal criminal crimes for which the Petitioners may be prosecuted for which the extended ten year statue of limitations under 18 U.S.C. 3293 has not run. The facts demonstrating this have been shown to this Court as required by law. The Petitioners are allowed by law to either have a continuance of the trial date until all federal statutes have run or to beable to assert the 5th amendment to any

and all inquires, whether oral, written or otherwise, regarding this civil law suit.

2.

18 U.S.C. SECTIONS 3293, 1343 And 1344

Title 18 U.S.C. section 3293 reads:

3293. Financial institutions offenses.

No person shall be prosecuted, tried or punished for a violation of, or a conspiracy to violate-

(1) section 215, 656, 657, 1005, 1006, 1007, 1008, 1014 or 1344;

(2) section 1341 or 1343, if the offenses affects a financial institution; or

(3) section 1963, to the extent that the racketeering activity involves a violation of section 1344;

unless the indictment is returned or the information filed within *10* years after the commission of the offense.

Title 18 U.S.C. section 1343 reads:

1343. Fraud by wire, radio or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio or television communication in interstate or foreign commerce, any writings, signs, signal, pictures, or sounds for the purposes of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more then five years, or both. If the violation affects a financial institution such person shall be fined not more

than $1,000,000 or imprisoned not more than 30 years, or both.

Title 18 U.S.C. section 1344 reads:

1344. Bank Fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice-

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

One of the leading case in the area of 18 U.S.C section 1344 is *U. S. v. Harris*, (S.D.N.Y. 1992) 805 F.Supp. 166, page 171, where the Court instructs as follows:

"To charge an offense under the statute, the government must allege conduct by defendant 'designed to deceive a . . . financial institution into releasing property, with the intent to victimize the institution by exposing it to actual or potential loss.' The indictment is sufficient if it 'allege[s] a scheme that was intended to victimize a bank.' This requires a 'nexis' between the defendant's conduct and the victim bank. 'Common sense' must inform the reading of the indictment; and the bank fraud statue itself, enacted to protect banks' financial integrity, 'should be read expansively.' (*United States v. Stavroulakis*, (2d Cir. 952 F.2d 686, 694-95).

"Notwithstanding that expansive reading, the bank fraud statue does not apply to 'situations where money

is merely withdrawn legally from a federally insured bank by a victim and where the bank itself is in no way victimized.' (*United States v. Blackmon*, (2d. Cir. 1988) 839 F.2d 900, 904). But 'the bank need not actually be victimized'; attempting to execute a fraudulent scheme 'with intent to victimize the bank' falls within the statue. *Strvroulakis* at 694. And a bank is 'victimized' within the ambit of the statute even if the scheme targets an accountholder's money, so long as the fraudulent conduct is directed at bank with the intent of deceiving it so that the bank loses custody over its customer's funds. (*United States v. Morgenstern*, (2d Cir. 1991) 933 F.2d 1108, 1114; *Blackmon* at 905-06 n. 5.)

Focusing the Court's attention back to the Blackmon case at page 905-906, footnote five, which reads:

"The district court concluded that the structure of section 1344(a) reflects two separate intentions (noting that terms connected in the disjunctive should be given separate meanings, *Garcia v. United States*, 469 U.S. 70, 73, 105 S.Ct. 479, 482, 83 L.Ed.2d 472 (1984)); i.e., under subsection (1), the fraud victim must be a bank, whereas under subsection (2), the victim need not be a bank as long as property under the custody or control of a bank is obtained. 648 F.Supp. at 231. First, this distinction is not determinative here, since we have already concluded that under the facts of this case (*Blackmon*) no property was unlawfully obtained at a time when it was under the custody or control of a bank. Second, if property *were* obtained at such time as it was under the custody or control of a bank, the bank would certainly be a victim. See *United States v. Lankford*, 573 F.2d 1051, 1053-54 (8th Cir. 1978) (when property is deposited in a bank, the bank owes a duty of care to protect those using its services); *United*

> *States v. Dix*, 491 F.2d 225, 227 (9th Cir. 1974) (same). Third, the legislative history suggests that the victimization of banks is the concern of subsection (a) in its entirety, and that subsection (a)(2) is designed to protect against schemes 'to obtain property of such an institution. . . .' (Citation Omitted.)

The case of *United States v. Morgenstern*, 933 F.2d 1108 (2nd Cir. 1991) is instructive as to the bank being the victim of a third party's fraud to a bank's account depositor. In *Morgenstern*, the sweater company hired an accountant, Morgenstern, to handle the tax affairs, including payroll taxes. Morgenstern decided in the mid-1980's to initiated a scheme to divert money designated by the sweater company to pay the payroll taxes into an account controlled by Morgenstern. Morgenstern would issue a check payable to Chemical Bank, an owner of the sweater company would sign the check, the check was for an amount greater than the payroll taxes, Morgenstern would deposit the check into the account at Chemical Bank controlled by him and not the one designated for the payroll taxes. This scheme netted approximately $728,000.00.

The *Morgenstern* court distinguished the case of *Blackmon*, in that:

> "In the present case, the fraud effected was not by inducing the victim to go to the bank and withdraw the funds himself, but by obtaining a check from the victim under false pretenses and then depositing it in a bank." . . .
>
> * * *
>
> "In this case, (*Morgenstern*), the money obtained by fraud was not lawfully withdrawn from the bank by the scheme's victim, who only subsequently transferred it to the wrongdoers. Rather, Morgenstern was able to obtain the money only by means of fraudulent conduct

directed at the bank itself; this conduct induced the bank to allow the deposit of funds (into the Amerco account) and their subsequent withdrawal that, in the absence of fraud, it never would have permitted.

"Because in this case the fraudulent conduct directed at the bank resulted in the improper release to a third party of a depositor's money without its authorization, the bank is properly viewed as an intended victim of the fraudulent scheme. By falling prey to this scheme the bank lost custody over its accountholder's money, exposing the bank to the real threat of civil liability for having succumbed to Morgenstern's fraudulent conduct. Indeed, in *Blackmon* itself the court acknowledged that 'if the property *were* obtained at such time as it was under the custody or control of a bank, the bank would certainly be a victim." (*United States v. Morgenstern*, (2nd Cir.) 933 F.2d 1108, 1112-1114.)

In the case of *United States v. Simpson*, 950 F.2d 1519 (10th Cir. 1991), the Court, on upholding a conviction under Title 18 U.S.C. section 1343 (wire fraud) stated at page 1523:

"We first examine the evidence before the jury. The object of the scheme was to attract to the bank brokered funds from third persons. Once the funds were received by the bank, the funds were owned by the bank and were the property of the bank. When these funds were transferred into Buyers' account, the bank was denied ownership of these funds and benefits therefrom, which included the custody of the funds and the right to make its own decision, i.e., to invest and receive interest, concerning these funds.

". . . 'the Bank was defrauded of something, which may include being defrauded of its right to have custody of

the funds, or of the right to make its own decisions as to how these funds were to be used.'

". . . In *Carpenter*, 484 U.S. at 28, 108 S.Ct. at 321-22, the Supreme Court concluded that a scheme to trade upon the victim's confidential information was a 'property right' within the purview of the wire fraud statute. A conspiracy to defraud the victim of the use or control of his money is also within the purview of the wire fraud statute. The terminology employed by the trial court , i.e., 'custody of the funds' and 'right to make its own decisions as to how these funds were to be used,' clearly encompasses only property rights. The scheme to defraud was intended to deprive the bank of its money or at least the right to use this money. A scheme where the accused intends to gain money or property at the expense of the victim is clearly within the purview of the wire fraud statute. *United States v. Stewart*, 872 F.2d 957, 960 (10th Cir. 1989)." (*United States v. Simpson*, supra, at page 1523.)

The *Simpson* court, in footnote one, listed the jury instruction as follows:

"An individual may be guilty of wire fraud in violation of Title 18, United States Code, Section 1343, even though he does not derive any personal benefit from the misappropriation. The government does not have to show that there was a permanent loss to the bank. Nor would repayment constitute a defense to the charges, if there has been a willful fraud. The test is whether the Bank was defrauded of something, which may include being defrauded of its right to have custody of the funds, or of the right to make its own decisions as to how these funds were to be used." (*Simpson*, supra, at page 1523, footnote one.)

In *United States v. Biggs*, 965 F.2d 10 (5th Cir. 1992) at pages 12-13, the Court resolves the issue of whether the bank must be a target or a victim of the fraud, whether the bank must be exposed to a risk before a person can commit bank fraud. The Biggs case has had the three published opinions. The Court stated as follows:

> ". . . Biggs testified that EDS and Southmark were the targets of her fraud and that she never intended to steal from Texas Commerce Bank or San Jacinto Savings and Loan Association. It is established that a perpetrator's fraud need not cause a financial institution to suffer an actual loss for a valid conviction under section 1344. (Citations Omitted.) In a Section 1344(a)(2) case, it is only necessary that the custodial bank be exposed to the risk of loss, i.e., exposed to civil liability. (See *Lemons*, 941 F.2d at 315-16.) (*United States v. Biggs*, supra, at page 12-13).

In *United States v. Goldblatt*, 813 F.2d 619 (3rd Cir. 1987) the Court instructs as follows regarding Title 18 U.S.C. section 1344:

> "According to this statute, this defendant can be convicted of bank fraud if the Government proves beyond a reasonable doubt that the defendant knowingly (1) engaged in a scheme to defraud a federally insured institution, or (2) participated in a scheme to obtain money under custody or control of the financial institution by means of false statements or representations.
>
> "The bank fraud statute condemns schemes designed to deceive in order to obtain something of value. (Citations omitted). . . . It is sufficient that the whole scheme involve fraudulent conduct. (Citation omitted). . . . The Government was not required to prove a scheme that PSFS (Philadelphia Saving Fund Society) incurred a loss in order to prove a scheme to defraud,

> (Citation omitted).... Likewise, it was not necessary for the Government to prove that the intended victim of the fraud was actually defrauded. (Citation omitted). Further, it was not necessary for the Government to demonstrate that appellant personally benefited from this scheme. (Citation omitted)."

As the case law demonstrates, "affects a financial institution", is a broad term and a bank is affected even when the fraud is directed toward the bank's account depositor or the account depositor's account and causes the bank to either lose or face the risk of losing custody or control of something of value, most likely the account holders' money. This fraud on a bank's account holder's money causes the bank to loose custody or control over the use and decision making of the use of this money. This is sufficient for the bank fraud.

C. 18 U.S.C. 1344 does not require petitioners to direct a criminal scheme solely at a bank, only to victimize a bank by means of a fraudulent scheme

The First Circuit Court of Appeals in *United States v. Brandon*, (1st Cir. 1994) 17 F.3d 409, at pages 425-426 states:

> "Defendants argue that the government must prove that they knew that the victim of their fraud was a federally insured financial institution. We disagree. The status of the victim-institution is not a separate knowledge element of bank fraud under section 1344 but an objective fact that must be established in order for the statue to apply.
>
> * * *
>
> "Defendants overstate the government's burden. The specific intent under section 1344 is an intent to defraud a bank, that is, an intent to victimize a bank by means of a fraudulent scheme. (Citations omitted). It has been established that the government does not have

> to show the alleged scheme was directed *solely* toward a particular institution, it is sufficient to show that defendant knowingly executed a fraudulent scheme that exposed a federally insured bank to a risk of loss. (Citations omitted)."

The Fifth Circuit Court of Appeals, in *United States v. Barakett*, (5th Cir.) 994 F.2d 1107, at pages 1110-1111, states:

> "In order to convict Barakett under 18 U.S.C. section 1344, the government had to prove his knowing execution of or attempt to execute a 'scheme or artifice-(1) to defraud a financial institution; or (2) to obtain any of the money, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations or promises. (Footnote 9 omitted).
>
> "Barakett essentially contends that he intended to defraud only his female victims and thus did not execute schemes to defraud any financial institution. (Footnote 10 omitted). In support of this assertion, he claims that the institutions suffered at worst purely theoretical potential losses because they could and did recover from the victims. This misperceives the law. The term 'scheme to defraud' does not admit of easy and precise definition, (Footnote 11 omitted) but includes 'fraudulent pretenses or representations intended to deceive others, in order to obtain money from the victim institution.' (Footnote 12 omitted). While section 1344(1) prohibits only crimes directed at financial institutions (Footnote 13 omitted), we have not held that the statute punishes only schemes directed solely at institutional victims. (Footnote 14 omitted). We have recognized that knowing execution of schemes

causing risk of loss—rather than actual loss— to the institution, can be sufficient to support conviction. . . ."

Petitioners need not, under the well established law, be found to have violated the law under 18 U.S.C. 1344 by solely or exclusively making misrepresentations to State Farm's bank. All that is required is that petitioners execute a fraudulent scheme causing risk of loss to a financial institution. No more need be proved. No more need be established to entitle petitioners to assert their respective 5th amendment rights so as not to be compelled to testify against themselves and potentially have, for the first time, evidence which may incriminate petitioners for which their is no other source of evidence

CONCLUSION

The dispute in the lower courts raises serious fundamental questions of individual rights to assert a fundamental right guaranteed by the Constitution of the United States, that no person shall be compelled to offer testimony against him/herself at any time. Petitioners respectfully request this Court to consider and accept this serious fundamental Constitutional question of individual rights and to issue Orders staying and vacating the lower court rulings and granting petitioners' writ allowing the assertion of petitioners fifth amendment rights.

Respectfully submitted,

LAW OFFICES OF JAMES R. GREINER

JAMES R. GREINER
Attorney for Petitioners

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

TERRANCE R. MOUNT and SHARON G. MOUNT,
Petitioner,

VS.

EL DORADO COUNTY SUPERIOR COURT,
Respondent,

STATE FARM FIRE AND CASUALTY COMPANY,
Real Party in Interest and Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA OF A DECISION OF THE COURT OF APPEAL THIRD APPELLATE DISTRICT OF A DECISION OF THE EL DORADO COUNTY SUPERIOR COURT

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Third Appellate District No. C018088
S039777

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

Terrance R. Mount, Petitioner

v.

El Dorado County Superior Court, Respondent

State Farm Fire and Casualty Company,
Real Party In Interest

Supreme Court
Filed
May 25, 1994

Robert Wandruff Clerk
Deputy

Application for stay and petition for review DENIED.

LUCAS
Chief Justice

In the
Court of Appeal of the State of California
In and For the
Third Appellate District

Terrance R. Mount, et al.
Petitioner

vs.

Superior Court, El Dorado County
Respondent

State Farm Fire and Casualty Company
Real Party In Interest

3 Civil C018088
El Dorado 57504

Filed
Apr 23, 1994

Court of Appeal Third District
By Robert Lindstrom Deputy

By the Court:

The petition for writ of mandate, prohibition or other relief with request for stay is denied.

Dated: April 28, 1994

BLEASE, Acting P.J.

---

cc: See Mailing List

In the
Court of Appeal of the State of California
In and For the
Third Appellate District

Mailing List

Re: Terrance R. Mount, et al.

vs.

Superior Court, El Dorado County

3 Civil C018088

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[18 USC section 1344] and wire fraud [18 USC section 1343]. The standard statute of limitations applicable to section 1343 offenses is five years [18 USC section 3282]. Under this statute, prosecution would be barred since the fraud was discovered by the victim in early 1988. However, 18 USC 3293 provides for a ten year limitations period for violations of section 1344 and section 1343 if "the offense affects a financial institution".

State Farm asserts prosecution under these statutes would have been barred under the five-year statute since section 3293 was not passed until August 9, 1989. The legislative intent behind section 3293 indicates it applies to offenses committed before and for which the limitations period had not run as of the time of enactment of section 3293 [*U. S. v. Brechtel* (5th Cir. 1993) 997 F 2d 1108,1113].

The Court has examined the case law cited by the parties and is satisfied that sections 1343, 1344, and 3293 require that the bank be the victim of the fraud, be exposed to risk of loss, i. e., civil liability, or in some other fashion be made the target of the deceptive activity [See *U. S. v. Blackman* (2nd Cir. 1988) 839F 2d, 900, 905-906; *U. S. v. Solomonson* (8th Cir. 1990) 908F 2d, 358, 364; *U. S. v. Rackley* (10th Cir. 1993) 986F 2d 1357, 1361; *U. S. v. Biggs* (5th Cir. 1992) 965F 2d 10, 12-13; *U. S. v. Pellulo* (3rd Cir.1992) 964F 2d, 193, 213; *U. S. v. Mason* (9th Cir. 1990) 902F 2d 1434, 1441-1443; *U. S. v. Simpson* (10th Cir. 1991) 950F 2d 1519, 1523; *U. S. v. Harris* (S.D.N.Y. 1992) 805F Supp. 166, 171-172; *U. S. v. Morgenstern* (2nd Cir. 1991) 933F 2d 1108, 1113-1114]. None of the cited cases is factually similar to the instant case.

The case most factually and legally in point to the instant case is *U. S. v. Blackman* (2nd Cir. 1988) 839F 2d 900, which holds that the bank fraud statues do not apply to "situations where money is merely withdrawn legally from a federally insured bank by a victim and where the bank itself

is in no way victimized (p. 904). There, defendants induced elderly victims to withdraw funds from a financial institution pursuant to a fraudulent scheme to convert the funds into foreign currency in order to supposedly invest in "high-return foreign investments".

In the instant case, defendants had no bank account or any funds invested in State Farm's bank. Like *Blackman*, their fraudulent scheme induced State Farm to legally withdraw its funds from the bank and pay their property loss claims. The bank was in no way the victim of the fraud. To construe the statutes as defendants desire would result in virtually every fraud that occurs in the modern financial world involving banks as being subject to prosecution under these statutes. The Court does not believe that this conforms with the intent behind those statutes. Accordingly, defendants are not subject to prosecution under sections 1343 and 1344.

CONCLUSION:

For the foregoing reasons, defendants' Fifth Amendment objections to the requested discovery are overruled. The remaining objections to the motion to compel are set for a hearing on April 1, 1994, at 10:00 a.m., in Dept. II.

cc: James Greiner 555 University Ave., Suite 290, Sacramento, CA. 95825-6511
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Supreme Court, U.S.
FILED
SEP 15 1994
OFFICE OF THE CLERK

No. 94-324

In The

Supreme Court of the United States

October Term, 1994

TERRANCE R. MOUNT and SHARON G. MOUNT,

Petitioners,

vs.

EL DORADO COUNTY SUPERIOR COURT,

Respondent,

STATE FARM FIRE AND CASUALTY COMPANY,

Real Party in Interest and Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of California Of A Decision Of The Court Of Appeal Third Appellate District Of A Decision Of The El Dorado County Superior Court

BRIEF IN OPPOSITION FOR REAL PARTY IN INTEREST

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29pp

QUESTIONS PRESENTED FOR REVIEW

1. Have petitioners, by submitting and receiving payment for fraudulent insurance claims, committed bank fraud under the provisions of Title 18 U.S.C. § 1344 and/or wire fraud which affects the financial institution under the provisions of Title 18 U.S.C. § 1343 so as to invoke the ten year statute of limitations provided under Title 18 U.S.C. § 3293[1]?

2. Have petitioners waived their right to assert a Fifth Amendment privilege during deposition questioning by responding to the same questions in prior discovery without asserting a Fifth Amendment privilege against disclosure at that time?

3. Have petitioners satisfactorily requested a stay of the underlying action?

---

[1] Petitioners state this issue in the context of Title 18 U.S.C. section 3292 but their points and authorities here and in courts below have been in the context of Title 18 U.S.C. section 3293.

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STATEMENT OF THE CASE

Petitioners submitted claims to their insurer, Real Party in Interest, State Farm Fire and Casualty Company (hereinafter State Farm) for one fire and three theft losses arising out of a May 28, 1984 fire and one fire on December 24, 1984. State Farm paid petitioners approximately $512,883.17 for these alleged losses.

In 1988, petitioners entered individual pleas of *Nolo Contendere* to insurance fraud (violation of California Insurance Code section 556(a)(1)) regarding the filing of a false insurance claim. This admittedly false claim concerned the fire on December 24, 1984.

In November 1990, State Farm filed an action for fraud, misrepresentation and recision of the petitioners' insurance contract. On April 8, 1991, State Farm served interrogatories on petitioners asking for the basis of their defenses to State Farm's complaint. On May 14, 1991, they both answered these interrogatories by denying any fraudulent activity and did not raise any objections. On April 5, 1991, State Farm served request for admissions on petitioners. Petitioners were asked to admit to arson and insurance fraud relating to both fires. On May 14, 1991, they both answered these requests for admissions by denying any fraudulent activities and did not raise any objections.

Although petitioners denied any wrongdoing in their answers to interrogatories and request for admissions, petitioner, Sharon Mount, asserted a Fifth Amendment privilege against self-incrimination (regarding potential bank and wire fraud prosecution) at her deposition when asked about the source of both fires and the validity of

the insurance claims. Attorney for petitioners had advised State Farm's counsel that petitioner, Terrance Mount, will refuse to answer these same questions and assert his Fifth Amendment privilege.

Petitioners moved to limit their deposition and trial testimony based upon a Fifth Amendment right against self-incrimination to crimes relating to bank and wire fraud. The trial court overruled petitioners' Fifth Amendment objections and ordered petitioners to answer all further questions without raising this objection. The trial court overruled these objections because 18 U.S.C. sections 1343 and 1344, as interpreted by case law, requires a bank be the victim of fraud, be exposed to risk of civil liability or in some other fashion be made the target of the fraudulent activity. The sole target of petitioners' fraud was State Farm.

Petitioners' request for writ of mandate, prohibition or other relief with request for stay was denied by the Court of Appeal for the Third Appellate District of California. The Supreme Court of California also denied petitioners' application for stay and the petition for review.

SUMMARY OF THE ARGUMENT

I. This case presents no issue appropriate for the court's exercise of its discretionary jurisdiction. It does not involve an undecided issue of federal law regarding liability for bank fraud or wire fraud under Title 18 U.S.C. section 3293.

II. There is an independent basis under State law for the ruling of the lower court based upon petitioners'

waiver of their right to claim a Fifth Amendment privilege against self-incrimination.

ARGUMENT

Title 18 U.S.C. section 3293 provides a ten year limitation period for wire fraud offenses under 18 U.S.C. section 1343 if "the offense affects a financial institution" and for bank fraud offenses under 18 U.S.C. section 1344. By definition, bank fraud under 18 U.S.C. section 1344 occurs when a person either knowingly defrauds a financial institution[2] or knowingly obtains property under the custody or control of a financial institution by means of

---

[2] At the time when these offenses occurred, 18 U.S.C. § 1344 provided:

> Whoever knowingly executed, or attempts to execute, a scheme or artifice – (1) to defraud a federally chartered or insured financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of a federally chartered or insured financial institution, by means of false or fraudulent pretenses, representations, or promises; [shall be guilty of an offense against the United States].

A technical amendment in 1989 deleted the words "federally chartered or insured" from the section leaving just "financial institution."

Pub.L. No. 101-73, Title IX, § 961(k), Aug. 9, 1989, 103 Stat. 500. Apparently, no substantive change was intended by this amendment as the definition of "financial institution" for all of Title 18, now contained at 18 U.S.C. § 20, still encompasses federally chartered or insured institutions. (*United States v. Brandon*, 17 F.3d 409, 424 fn. 11 (1st Cir. 1994).)

false or fraudulent pretenses, representations, or promises. Title 18 U.S.C. § 1344.

Title 18 U.S.C. section 3293 provides a ten year statute of limitations for violation of Title 18 U.S.C. section 1343 or section 1344. Petitioners did not violate either statute because they did not knowingly defraud a financial institution or knowingly obtain property under a financial institution's control by means of false pretenses, representations or promises. Specifically, none of petitioners fraudulent acts were directed at a bank or exposed a bank to potential civil or criminal liability. Additionally, they did not commit an offense that affects a financial institution.

Furthermore, petitioners waived any right to assert a Fifth Amendment privilege at deposition or trial by their verified answers to discovery on these same issues without ever asserting a Fifth Amendment privilege.

The Fifth Amendment protection against compelled self-incrimination is limited to when a witness has reasonable cause to apprehend danger from a direct answer. *Hoffman v. United States*, 341 U.S. 479, 486 (1951). At the time petitioners answered interrogatories and request for admissions they were represented by counsel.

Petitioners assert they face potential prosecution for mail fraud (18 U.S.C. § 1343) and/or bank fraud (18 U.S.C. § 1344) under 18 U.S.C. § 3293. For reasons stated below, this fear is unfounded and their subsequent assertion of any Fifth Amendment privilege is unwarranted.

I.

PETITIONERS HAVE NO BASIS UPON WHICH TO CLAIM A FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION BECAUSE THEY FACE NO THREAT OF CRIMINAL PROSECUTION UNDER EITHER 18 U.S.C. SECTION 1343 OR 18 U.S.C. SECTION 1344.

A. Petitioners Did Not Commit An Offense Which Affects A Financial Institution.

The controlling authority under the facts of the instant case is *United States v. Blackmon*, 839 F.2d 900 (2d Cir. 1988)[3] which holds that the bank fraud and/or mail fraud statutes do not apply to "situations where money is merely withdrawn legally from a federally insured bank by a victim and where the bank itself is no way victimized." *Id.*, at 904. In *Blackmon*, con artists persuaded women to withdraw their own money from a bank and convert it to foreign currency which was given to the con

---

[3] *Blackmon* is controlling because it interprets the scope of bank fraud statutes in the context of a criminal prosecution for both mail and bank fraud. The court specifically refused to allow an overbroad interpretation of the term "custody and control," (as used in context of a bank fraud case). In *Blackmon*, in the context of a mail and bank fraud case, the court did not extend the definition of either mail or bank fraud statutes. "The legislative history of the bank fraud statutes strongly indicates that Congress intended that it have the same broad scope as the mail fraud statutes, 18 U.S.C. § 1341 *et seq.*" *United States v. Bonallo*, 858 F.2d 1427, 1432 (9th Cir. 1988). Therefore, the narrower interpretation of the statutory terms used in *Blackmon* should be used when defining terms in both 18 U.S.C. § 1343 (mail fraud) and 18 U.S.C. § 1344 (bank fraud).

artist. *Id.* Defendants were found guilty by the trial court of bank fraud and mail fraud under sections 18 U.S.C. 1344 and 1343. *Id.*, at 902. The court of appeal reasoned that withdrawal of money from the banks was legal because it was done "by means of false or fraudulent pretenses, representations, or promises" as outlined by 18 U.S.C. § 1344(a)(2). Rather, they were merely legal withdrawals by the victims. *Id.*, at 904. Thus, even if the legal withdrawal of money was imputed to defendants, these acts did not constitute criminal conduct.

In reaching its holding, the *Blackmon* Court reviewed the legislative intent behind 18 U.S.C. sections 1343 and 1344. The statutes should only be applied to schemes to defraud a "national credit institution . . . or protect the financial integrity of a federally controlled or insured bank." *Id.*, at 906. The court in *Blackmon* recognized that if the bank fraud statute (18 U.S.C. section 1344) applied to the facts before it, then the statute could apply to any situation where "property purchased with money legally withdrawn from a federally insured bank was later fraudulently obtained." Therefore, the *Blackmon* Court reversed the trial court conviction under the bank fraud statute. *Id.*, at 917.[4]

Petitioners assert that whether a bank ever has "custody or control of the monies" is the pivotal inquiry in

---

[4] This same concern, that all fraud would be covered by this statute when money is legally withdrawn from a bank, was raised by the trial court in this case. Specifically, if petitioners could be guilty of bank fraud because their victim paid with a check then every fraudulent scheme involving the use of a check would trigger a potential bank fraud prosecution.

determining whether a fraud affects a financial institution within the meaning of 18 U.S.C. § 3293. Thus, they assert that a fraud victim's issuance of a check from its bank is a sufficient "nexus" between defendants' conduct and the bank to constitute bank fraud. However, *Blackmon* makes it clear that the bank fraud statute does not apply to situations where a victim merely withdraws money from a federally insured bank. *Id.*, at 904. State Farm legally withdrew funds from its own bank when it issued a draft to the petitioners. Not only was this an exercise of its right as a depositor, but State Farm could have maintained an action against the bank had it improperly dishonored these valid checks. *Allen v. Bank of America*, 58 Cal.App.2d 124, 127 (1943).

In refusing to extend criminal liability for bank or wire fraud to cases where a victim's money had "at one time been under the custody or control of a federally insured bank" the *Blackmon* Court recognized:

> If a statute applied to these facts, it could apply to any situation where property purchased with money legally withdrawn from a federally insured bank was thereafter fraudulently obtained. The statute does not 'plainly' yield such an extraordinary result. *Id.*, at 904.

The *Blackmon* Court did an exhaustive search of applicable legislative history, regarding 18 U.S.C. section 1341 and 1343. *Blackmon* states:

> The [House Judicial Committee] committee, however, is concerned by the history of expansion and interpretations of that language [i.e., "scheme to defraud" in 18 U.S.C. section 1341 and section 1343] by the courts. The current

> scope of wire and mail fraud offenses is clearly greater than that intended by Congress. Although the Committee endorses the current interpretations of the language, it does not anticipate any further expansions. *Id.*, at 906.

Before a criminal prosecution for bank fraud is warranted, "it was Congress' intent that a federally insured or chartered bank must be the actual or intended victim of the scheme." *United States v. Stavroulakis*, 952 F.2d 686, 694, *cert. denied*, 118 L.Ed.2d 580 (2nd Cir. 1992).

To extend bank fraud liability under 18 U.S.C. § 1344 or wire fraud liability under 18 U.S.C. § 1343 to all cases in which transfers made from a defrauded individual to the defendant, via a check, would contravene the logic of *Blackmon* and do nothing to advance the legislative intent behind the creation of these statutes. Thus, the fact that State Farm issued petitioners drafts from its bank account as a result of petitioners' fraudulent conduct *directed solely toward State Farm* is an insufficient basis to extend the statute of limitations under 18 U.S.C. § 3293 for an offense that "affects the financial institution."

B. Petitioners Did Not Violate 18 U.S.C. Section 1344 Because They Did Not Specifically Intend To Deceive A Bank.

Title 18 U.S.C. section 1344(a)(1) requires that a defendant direct his fraud toward a bank.

> [A] conviction under the "scheme to defraud" clause of the bank fraud statute requires that the defendant engage in or attempt to engage in a pattern or course of conduct designed to deceive

> a federally chartered or insured financial institution into releasing property. *United States v. Stavroulakis, supra,* 952 F.2d 686, 694.

The specific intent requirement of 18 U.S.C. § 1344 has been examined in several cases. *United States v. Mason* 902 F.2d 1434 (9th Cir. 1990), involved defendants who operated a prostitution ring and subsequently sent credit card slips to a co-defendant in California who had a merchant account with a bank. The California defendant received immediate credit through the bank for the amount of the deposited credit card sales drafts and sent a percentage of his profit to his partners in the prostitution ring. The California merchant did not disclose to the bank that he processed credit card sales for prostitution agencies. Subsequently, the bank lost money due to numerous customer disputes on the sales slips deposited with the account. In other words, the bank was directly defrauded.

In finding the defendants guilty of bank fraud under 18 U.S.C. § 1344, the *Mason* court ruled "A business applicant who misrepresents the true nature of the business would secure credit solely on the basis of the false statements." *Id.,* at 1442. The evidence in *Mason* showed that the bank would not have opened a merchant account for defendant had it known that he would process third-party credit card slips or was laundering credit charges for a prostitution ring. Based on these facts the specific intent to defraud a bank, as required by the statute, was found to exist.

In *United States v. Swearingen,* 858 F.2d 1555 (11th Cir. 1988), (per curiam), *cert. denied,* 489 U.S. 1083 (1989), two automobile dealers devised a scheme to obtain interest-

free loans. They fabricated automobile sales intended to deceive their bank into giving each dealer immediate credit by increasing the checking account balances in the amount of the fictitious sales. Documents were given to the bank as evidence of the purported sales. Defendants argued that they did not intend to defraud the bank because they were actually selling one another car titles. *Id.*, at 1556.

The court held that: "Defendant knew that the bank believed that the envelopes [containing title documents] represented actual, legitimate sales of vehicles, and that he used that perception to deceive the bank in order to obtain an immediate credit on non-existent sales." *Id.*, at 1557. Thus, these were false factual assertions made by defendant with the *specific intent to defraud the bank.*[5] In other words, the bank was directly defrauded.

In *United States v. Bonallo,* 858 F.2d 1427 (9th Cir. 1988), a bank employee withdrew cash from an automatic teller using his ATM card and then used the bank's computer system to change the ATM card numbers so that the withdrawal was charged to the account of another bank customer. Defendant claimed he could not be convicted under § 1344 because the requisite scheme to "defraud" the bank did not occur until after the cash was already taken. Rejecting the defendant's contention, the

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[5] In the present case there were no false or deceptive representations to State Farm's bank by defendants. All of the deceptive representations were made directly and only to State Farm. Each of the above cases dealt with defendants intending to deceive banks not bank customers.

Bonallo court surmised: "All that is necessary is the existence of a knowing and material misrepresentation designed to deceive, specific intent, and use of the mails or wires in furtherance of the scheme." *Id.*, at 1433. The bank was required to reimburse the accounts that had been wrongly charged. Thus, the bank was exposed to potential monetary loss and the bank was the intended victim, not the customers. Defendant's fraud was actually a theft from the bank.

In the present case, there have been no false or misleading statements made by defendants *to State Farm's bank*. Defendants' misrepresentations were *directed exclusively at State Farm* with an intent to defraud that entity alone. It was of no concern to the petitioners where State Farm obtained the funds they ultimately received. Thus they lacked the specific intent to defraud any bank or entity other than State Farm.

The party asserting a privilege is required to provide sufficient information for the court to make an informed decision regarding an objection to discovery based upon that privilege. *Blackburn v. Superior Court*, 21 Cal.App.4th 414, 432-433 (1993). Petitioners have produced no evidence to establish their specific intent, under 18 U.S.C. § 1344, to defraud a bank. Therefore, their request for Fifth Amendment immunity from prosecution for bank fraud under that statute should be denied.

C. Petitioners Did Not Violate 18 U.S.C. Section 1344 Because They Did Not Knowingly Obtain Monies Under The Custody And Control Of A Federally Chartered Or Insured Financial Institution By Means Of False Or Fraudulent Pretenses, Representations Or Promises Directed Toward A Bank.

Petitioners cite numerous case excerpts and statutes in support of their very broad contention that a bank is affected even when fraud is directed toward a bank customer. Based on this contention, petitioners argue that fraud on the bank's customer causes the bank to lose custody or control of money and this is sufficient to constitute bank fraud. Citing *United States v. Brandon*, 17 F.3d 409 (1st Cir. 1994) petitioners urge that 18 U.S.C. section 1344 requires only that petitioners victimize a bank by means of a fraudulent scheme directed at bank customers. However, the *Brandon* Court did not intend for the ruling to be interpreted so broadly:

> We do not address whether any scheme to defraud, regardless of its intended victim, can be prosecuted under the bank fraud statute as long as it has some detrimental effect on a federally insured bank. In this case at least, the government did prove the scheme was intended to defraud a financial institution: Homeowners or East West, if not Bay Loan itself. *United States v. Brandon, supra*, 17 F.3d 409, 427.

Petitioners have misconstrued the cases they cited in support of their broad assertion that a fraudulent scheme directed solely at a bank customer actually defrauds the bank.

United States v. Harris, 805 F.Supp. 166 (S.D.N.Y. 1992) illustrates this point. At issue in *Harris* was the sufficiency of the government's allegations based on bank fraud violations under 18 U.S.C. § 1344 and wire fraud under 18 U.S.C. § 1343. *Id.*, at 171. In *Harris* several corporations (controlled by defendant Harris) borrowed money from a consortium of banks under a revolving credit agreement. Creation of this agreement was based upon the approval of lenders who relied on reports submitted by Harris. These reports informed the lenders whether loan covenants were being met. Defendant filed fraudulent reports with these banks, resulting in loans exceeding $200,000,000 based on collateral of less than $35,000,000. Harris and other officers were charged with fraudulent inducement to lend. *Id.*, at 168-170. The *Harris* court stated:

> To charge an offense under the bank fraud statute, 18 U.S.C. § 1344, the government must allege conduct by a defendant designed to deceive a financial institution into releasing property, with the intent to victimize the institution by exposing it to actual . . . loss. *United States v. Harris, supra*, 805 F.Supp. 166, 171.

The *Harris* court reasoned that this is exactly what defendant Harris had done in his dealings with the bank. Harris gave the banks financial assurances in order to obtain loans he would not have otherwise received. The *banks* relied upon Harris' fraudulent assurances, which concealed speculative trading and falsified documents. *Id.*, at 171-172. *The banks were the direct intended victims of Harris' conduct.* This conduct was the type of conduct which warranted prosecution for bank fraud. *Id.*, at 171.

In the case at bar, petitioners argue that State Farm's bank was the intended victim of petitioners' insurance fraud scheme because it lost "custody and control" of money paid by State Farm to petitioners under petitioners' false insurance claims. There is no correlation between a defendant who purposefully and *directly defrauds a bank* in order to obtain funds from it (e.g. by fraudulently overstating values, concealing speculative trading and falsifying documents) and the facts of this case where the misrepresentations were made to a third party, State Farm, causing State Farm to *legally* withdraw money from its bank. Defendants cannot show any direct misrepresentations to the *bank* made by them, or reliance by the *bank* on any of their representations, or direct release of funds by the *bank* based upon these representations. The facts of this case stand in stark contrast to the facts of *Harris*. Clearly, the direct victim of the petitioners' fraud (under the rule in *Harris*) is State Farm.[6]

Defendants' interpretation of *United States v. Blackmon, supra,* 839 F.2d 900 is equally incorrect and too narrow. The emphasis in *Blackmon* was on the terms "property . . . unlawfully obtained at a time when it was under the custody or control of a bank" (*Id.*, at 905-906) as it refers to situations in which the *bank* faces the risk of civil liability for improperly releasing a depositor's funds. *United States v. Dix,* 491 F.2d 225, 227 (9th Cir. 1974).

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[6] Even petitioners do not argue that State Farm is a "financial institution" within the meaning of either 18 U.S.C. § 1343, § 1344 or § 3293.

In the instant case, State Farm's bank risked no civil liability when it released funds to petitioners. In fact, the bank had a duty to release those funds upon request of its depositor (State Farm) and would be liable in damages to its customer if it did not honor a valid check. *Allen v. Bank of America, supra,* 58 Cal.App.2d 124, 127. Clearly, when taken in context, the words "custody or control" in section 1344 are not dispositive of liability under either the bank fraud or mail fraud statutes. The words are intended to describe custody and control and the risk of civil liability for its action associated with the bank fraud. Additionally, it defines where the money which is the goal of the fraud is located. In other words a defendant's acts must be directed toward money under custody and control of a bank *and* the act must be directed at the bank.

This point is further supported by *United States v. Morgenstern,* 933 F.2d 1108, *cert. denied* 112 S.Ct. 1188 (2nd Cir. 1991), which is clearly distinguished from *Blackmon* because *Morgenstern* did not involve the lawful withdrawal of money from a bank (as was the case in *Blackmon*). The defendant in *Morgenstern* was able to fraudulently obtain the money only by means of conduct *directed at the bank itself,* thereby inducing the bank to allow withdrawal of funds. *Id.,* at 1113-1114. The *Morgenstern* court's concluded that the bank was the "intended victim" of the fraudulent scheme because of the subsequent civil liability of the bank to its account holder. *Id.*

Petitioners cite *United States v. Simpson,* 950 F.2d 1519 (10th Cir. 1991) for the proposition that "the test is whether *the Bank* was defrauded of something, which may include being defrauded of its right to have custody

of the funds . . . " *Id.*, at 1523, footnote one. However, *Simpson* involved schemes to loot a small bank principally owned, controlled and managed by a defendant who had ordered illegal cash transfers in the bank. *Id.*, at 1520. Again, the fraud was directed at the bank, not an account holder.

Likewise, *United States v. Biggs*, 965 F.2d 10, *cert. denied* 113 S.Ct. 1016 (5th Cir. 1992), supports State Farm's proposition that in order to be considered the target or victim of fraud, the custodial bank need only be exposed to the risk of civil liability from its depositor. *Id.*, at 12-13. *Biggs* involved an employee whose responsibilities included investment of surplus cash in company accounts at financial institutions. This employee initiated unauthorized transfers. The *Biggs* court found that was bank fraud. The victim was the bank not the account holders because the bank had ultimate responsibility to its customers for any losses. Thus, the "custody and control" contemplated by the statute and case law only operates within the context of *banks* facing potential civil liability for their act of releasing funds. In this case, State Farm's bank was under an obligation to release the funds, it faced no potential civil liability as a result of such release, and the authorities cited by petitioners are simply not on point.

II.

PETITIONERS' PRIOR DISCOVERY RESPONSES, WITHOUT ANY OBJECTION, WAIVED THEIR RIGHT TO SUBSEQUENTLY ASSERT A FIFTH AMENDMENT PRIVILEGE

Petitioners' answers to State Farm's requests for admissions and interrogatories denied any wrongdoing in connection with the May 1984 and December 1984 fires, the proof of loss documents submitted regarding those fires, and the proof of loss documents submitted with regard to the three thefts which allegedly occurred in May and June 1984. Petitioners' verified responses, without objection, waived petitioners' right to subsequently assert a Fifth Amendment privilege on the same subject.

If an objection to a discovery request is not raised in a timely manner, the objection is waived. *United States v. Kordel*, 397 U.S. 1, 11-12 (1970); *Brown v. Superior Court*, 180 Cal.App.3d 701, 709 (1986); *Deyo v. Kilbourne*, 84 Cal.App.3d 771, 785 (1978); See also, *Coy v. Superior Court*, 58 Cal.2d 210, 216-217 (1962); *Leach v. Superior Court*, 111 Cal.App.3d 902, 906 (1980).

> Numerous cases have held that if an objection to interrogatories is not raised within that 30-day period, the objection is waived, absent good cause for relief from default. *We see no basis for treating the privilege against self-incrimination differently than any other privileges which may be so waived.* [emphasis added] *Brown v. Superior Court, supra*, 180 Cal.App.3d 701, 709.

In *Brown*, the defendants were served with interrogatories. No answers or objections to the interrogatories were filed and plaintiff moved for a motion to compel. The court ordered defendants to answer the interrogatories. Defendants failed to answer the interrogatories under court order. After plaintiff filed a second motion to compel, defendants served written objections to the interrogatories, including a Fifth Amendment privilege objection. The appellate court held that if a party fails to assert the Fifth Amendment privilege in response to a valid discovery request, the *objection is waived. Brown v. Superior Court, supra,* 180 Cal.App.3d 701, 709.

In the case at bar, petitioners did not raise the Fifth Amendment privilege in their responses to State Farm's requests for admissions or in their answers to State Farm's interrogatories. In fact, petitioners filed verified denials to the requests for admissions and interrogatories. Therefore, petitioners have waived their right to assert a Fifth Amendment objection.

The trial court relied upon *Alvarez v. Sanchez,* 158 Cal.App.3d 709 (1984) to support its conclusion that petitioners did "not waive this privilege by furnishing testimony prior to trial." *Id.*, at 715. *Alvarez* concerned defendants in a civil action who refused to testify based upon their privilege against self-incrimination. *Id.*, at 711. The trial court held that defendants had waived their privilege against self-incrimination by filing a verified answer to the complaint, and struck the portion of the defendants' answer that constituted denials. The appellate court reversed, holding that striking the answer was unduly harsh as it relieved plaintiff of its obligation to

prove its case, and imposed a civil forfeiture upon defendants for a good faith exercise of their constitutional rights. *Id.*, at 714. The *Alvarez* court reasoned that the same principles applied regardless of whether the civil defendant invoked their constitutional rights at *pretrial* proceedings or *at trial*. Because defendants were able to introduce other evidence to establish their affirmative defenses, it was error to deny them the opportunity of trying the case. *Id.*

The instant case is highly distinguishable from the facts of *Alvarez*. The defendants in *Alvarez* made timely assertions of their Fifth Amendment privilege throughout the discovery process. It was only their verified answer to the complaint which was alleged to have constituted a waiver. *Id.*, at 711. In contrast, petitioners in this case answered interrogatories and responded to requests for admissions with outright denials when the opportunity to claim the Fifth Amendment privilege was a viable alternative. Because they chose to partially disclose facts surrounding the fires and subsequent misrepresentations rather than claiming a privilege against self-incrimination, petitioners impliedly and constructively waived their privilege with regard to other facts connected with those events. *Regents of Univ. of Calif. v. Superior Court*, 200 Cal.App.2d 787, 791 (1962).

The issue presented in *Alvarez* was entirely different than the instant case. The issue in the instant case is not whether the appropriate *remedy* is striking that portion of petitioners' answer constituting denials and allowing the case to proceed as a default matter. Here, the issue is whether petitioners waived their rights to claim a Fifth

Amendment privilege because they did not raise the objection in response to prior discovery.

The cases relied upon by the *Alvarez* court in support of the broad proposition that a witness is "free to assert the privilege at trial even though he or she had given testimony during pretrial proceedings" referred to the right of a *criminal defendant* to claim the Fifth Amendment privilege at trial where he had voluntarily testified at either a preliminary hearing or a grand jury proceeding, (*Overend v. Superior Court,* 131 Cal. 280, 284 (1900); *People v. Maxwell,* 94 Cal.App.3d 562, 570 (1979)), or the right of a witness to refuse to testify in the *separate* criminal proceeding of a co-defendant when that witness was appealing a criminal conviction in his own proceeding. *People v. Lopez,* 110 Cal.App.3d 1010 (1980).

The law governing the absolute Fifth Amendment privilege of a criminal defendant is distinct from that which governs the Fifth Amendment privilege of civil witnesses. 2 *Witkin,* Evidence §§ 1310 through 1421. The right of a criminal defendant to refuse to take the stand in his own criminal trial is fundamentally different than a civil defendant's right to deny, answer or object to interrogatories. As the *Alvarez* case did not deal with the failure to assert a privilege during civil discovery, any supposed "rule" pertaining to such a factual scenario from that case is only dicta and inappropriate to apply in this case.

Thus, the rule in *Brown v. Superior Court, supra,* 180 Cal.App.3d 701, is in accord with the rule enunciated by this court in *United States v. Kordel, supra,* 397 U.S. 1, 11-12. The court in *Kordel* held that if a party that fails to

raise a Fifth Amendment objection during discovery then the privilege is waived. *Id.* at p. 9-10. Therefore, petitioners have waived their right to assert a Fifth Amendment privilege to questions they have already substantively answered.

III.

PETITIONERS HAVE NOT PROPERLY SOUGHT A STAY OF THE UNDERLYING ACTION

In their conclusion, petitioners improperly requested this court issue an order staying and vacating the lower court rulings. State Farm has received no notice of any application for stay filed on petitioner's behalf pursuant to 28 U.S.C. section 2101 (f). A mere petition for certiorari before the Supreme Court will not affect a stay of the action. *Peabody Coal Co. v. Navajo County*, 572 P.2d 797 (1977). If the court grants petitioners' writ for certiorari, State Farm requests specific clarification regarding whether a stay is granted.

CONCLUSION

The above-mentioned authorities establish that in order for the ten year statute of limitations in 18 U.S.C. § 3293 to apply to prosecution for bank fraud under 18 U.S.C. § 1344 or mail fraud under 18 U.S.C. § 1343, the bank must be exposed to risk of loss by means of civil liability or be the target of a petitioner's deceptive activity. Mere loss of property that at one time was under the

custody or control of a financial institution is not sufficient to warrant criminal prosecution under the bank fraud or wire fraud statutes at issue.

Therefore, petitioners face no potential liability for these crimes and have no basis upon which to claim a Fifth Amendment privilege. Furthermore, any Fifth Amendment privilege which may have existed in this regard was waived by petitioners' verified discovery answers. Accordingly, it is respectfully requested that this Court not exercise its discretionary jurisdiction and that this petition for writ of certiorari be denied.

Respectfully submitted,

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